



April 4, 2002

Mr. Therold I. Farmer
Walsh, Anderson, Brown, Schulze & Aldridge
P.O. Box 2156
Austin, Texas 78768

OR2002-1664

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160782.

The Lago Vista Independent School District (the "district"), which you represent, received a request for the following information:

1. TIE grant documentation, 1998-2000;
2. All documents pertaining to school finances and expenditures between September 1, 1998 and January 11, 2002; and
3. Payroll journal for 1998-1999 and payroll transmittal for 1998-1999.

You state that the documents responsive to category one of the request will be made available to the requestor. You also state that the information responsive to category two of the request no longer exists in accordance with the records retention schedule established under the Local Government Records Act. We find that the Public Information Act (the "Act") does not require the district to disclose information responsive to category two of the request because, according to the district, this information did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Finally, you claim that the highlighted information responsive to category three of the request is excepted from disclosure under sections 552.101, 552.102, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.136 of the Government Code makes certain account number information confidential and provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We agree that the account numbers you have highlighted are confidential under section 552.136 of the Government Code, and therefore, must be withheld from the requestor.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act.² See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. This office has previously found that financial information relating to an individual ordinarily satisfies the first

²Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by the common-law right to privacy.

requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). A public employee's allocation of his salary to a *voluntary* investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common-law right of privacy if the transactions are not funded in whole or in part with public monies. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1992) (deferred compensation plan). Where a transaction is funded in part by the state, however, it involves the expenditure of public monies in which there exists a legitimate public interest, and the transaction is therefore not protected by privacy. Open Records Decision No. 600 (1992). We find that to the extent the deductions you have highlighted concern optional insurance and annuities, you must withhold those deductions from disclosure under the common-law right to privacy.

Section 6103(a) of title 26 of the United States Code renders tax return information confidential. Section 552.101 of the Government Code encompasses information protected from disclosure by other statutes. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. 26 U.S.C. 6103(b)(2). This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989). Furthermore, information on a federal W-2 form regarding the amount of federal income and FICA tax withheld and total FICA wages is excepted by section 6103(a) of title 26 of the United States Code. Open Records Decision No. 226 (1979). We find that because the deductions you have highlighted do not constitute tax return information, you may not withhold any of this information pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.117 of the Government Code excepts from disclosure the home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential in accordance with section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). The district must withhold this type of information pursuant to section 552.117 only to the extent that the respective employee elected to keep this information confidential prior to the district's receipt of the current records request.

If an employee did not timely elect to withhold their social security number as prescribed by section 552.024, the social security number may nevertheless be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). See Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained

and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the responsive information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the district should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

Finally, in regard to your argument concerning the unconstitutional gift of public funds, we note that this office may only decide whether information requested under the Act is within an exception under the Act pursuant to section 552.301(a) of the Government Code. Therefore, we cannot address your argument regarding the constitutionality of the Act itself. We further note that questions or complaints about charges for public information must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

In summary, the district must withhold the account numbers you have highlighted under section 552.136 of the Government Code. To the extent the deductions you have highlighted concern optional insurance and annuities, you must withhold those deductions under the common-law right to privacy. Finally, the district must withhold social security numbers of current or former officials or employees pursuant to section 552.117 only to the extent that the respective employee elected to keep this information confidential prior to the district's receipt of the current records request. If an employee did not timely elect to withhold their social security number as prescribed by section 552.024, the social security number may nevertheless be confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/sdk

Ref: ID# 160782

Enc: Submitted documents

c: Ms. Kay Carr
2811 Declaration
Lago Vista, Texas 78645
(w/o enclosures)